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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1353

THE ELMO COMPANY, INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF

The case treated in respondent's brief is not that made by petitioner.

In summary, petitioner's argument involved only three points which can be listed in syllogistic order:

1. A different set of public interest factors is involved in reopening an existing decree under § 5(b) of the Act than is involved in issuing an original complaint.
2. These factors under the terms of the Act must be established by adversary procedures.
3. Therefore, a reopening order based solely on Commission evidence did not grant petitioner the statutory hearing.

I

On these three points, respondent ignores the first, presumably adopting the holding of the Court of Appeals that the factors are the same in both cases. We concede that this holding of the Court of Appeals constitutes the prin-

cipal question of law on the present application and say it contradicts the holding of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). Here, the record demonstrates that respondent ordered the proceedings from which this appeal is taken:

> "Not to achieve the purposes of the provisions of the decree, but to escape their impact." *United States* v. *United Shoe Machinery Corp.*, U.S. , 36 LW 4412, 4413 (May 20, 1968)

The 1952 decree limited petitioner to a single claim, copied verbatim from the finding made by the Commission at that time. Since petitioner has so limited its advertising since 1952, the purpose of that decree has been fully achieved. This is the fundamental distinction between the present case on the one hand, the *Mohr* case which respondent cites and *United Shoe Machinery Corp.*, on the other. In the present case, respondent does not seek to modify a decree to carry out the original purpose, but rather seeks to change the *factual basis* of the earlier decree, covering its lack of evidence of any change of fact by asserting "public interest".

If respondent is in a position to reopen the decree by showing a change of fact from 1952, let it do so openly. To assert "public interest" to avoid such a showing is a judicially unacceptable evasion of the Congressionally imposed administrative burden of proof.

II

Respondent avoids reference to the terms of the Act itself by asserting:

> ". . . the case involves procedures which have been superseded by the Commission's current rules of practice." (Resp. 6)

The controlling procedure is that set by the *statute*, not by any rule of respondent; (cf. the Court of Appeals prior

rejection of this argument (Pet. 40a) and the Eighth Circuit's response to it in *American Drug* (Pet. 19)). Whatever may be respondent's "current rules of practice" they are valid or not according to whether they are

> "consistent with the Congressional intent." (Pet. 41a)

The adversary consideration for which petitioner here argues is that of § 5(b) itself

> ". . . after notice and opportunity for hearing".

It is on the content and meaning of that phrase that this case is one of first instance in this Court.

III

Respondent avoids the *ex parte* nature of respondent's consideration in this case by misdescribing the stipulation of the parties:

> "Petitioner . . . stipulated . . . the Commission's findings that *the medical testimony* supports the conclusion that the Elmo Treatment has no beneficial effects whatever . . ." (Resp. 6) (Emphasis added)

To the contrary, what we did stipulate was respondent's entirely different finding that:

> "2. The medical testimony in the record, *summarized in Finding 10* [Respondent's evidence *only*] . . . supports the conclusions that . . . Elmo . . . [has] no beneficial effect . . ." (Pet. 7a, Resp. 5) (Emphasis added)

This is the distinction of fact on which the case turns. We concede that Commission evidence alone (i.e. Finding 10) is adequate to issue an initial complaint. But we say it must be fairly weighed against petitioner's showing under the reopening procedure fixed by Congress—an *adversary* determination reviewable as such by a Court of Appeals.

IV

"If the Elmo Treatment has no beneficial effects whatever on hearing difficulties, thousands of trusting buyers may be defrauded or possibly injured by reliance on Elmo's promotional representations."

(a) Petitioner objects to *in terrorem* semantics in a brief addressed to this Court. We view such a rankly emotional appeal as a patent effort to divert attention from the proper appellate issues. As respondent necessarily knows, the only evidence on such points in the entire record is that of petitioner that (i) in 30 years no person has ever been injured by Elmo, (ii) 250,000 persons have reported receiving relief from this preparation, (iii) Elmo is not *sold*, it is mailed on request to be paid for after use only by those who voluntarily report symptomatic relief (3/5's of users), (iv) the ingredients are those used by all but one medical witness on both sides (Record references at Pet. 49a-55a). Respondent at the hearing never made the slightest effort to counter this proof—apparently as we say on the subsequently justified assumption that only respondent's presentation was to be considered in any event.

(b) As to:

"Elmo's promotional representations,"

these are the statements which, in a formal finding of public interest by respondent in 1952, Elmo was authorized, and—if it was to stay in business—was directed to make by the consent decree. Respondent's present repudiation of the conclusions of former Commissioners is not made more attractive by such a characterization.

GEO. STEPHEN LEONARD,
Attorney for Petitioner.

May 27, 1968.

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